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substances;

38. (New) A cream composition consisting essentially of:  
10% to 20% of a milk derivative;  
8% to 30% of a sugar;  
10% to 60% of a fermented dairy product;  
0.01% to 25% of sour cream or dairy cream containing 25% to 45% of fatty  
0.01% to 35% of a texturizing agent;  
0.01% to 20% of an aromatic product; and  
0.01% to 0.5% of salt.

#### REMARKS

New claims 26-38 are pending in this application for the Examiner's review and consideration. A clean set of these claims is attached hereto as Appendix A.

Claims 1-12 were cancelled without prejudice to Applicants' right to file one or more divisional applications for these claims. Regarding the Examiner's comments about the product-by-process claims, the law recognizes that the patentability of such claims is based on their product features so that they should be examined with the other product claims. To expedite the prosecution of this application, however, the product-by-process claims have been cancelled.

New independent claims 26 and 38 are supported by independent claim 13. Claim 26 recites that a texturizing agent must be present, while claim 38 recites that all components are mandatory, and that the composition does not include other ingredients that would have a material effect on the basic characteristics of the composition. Claims 20-22, and 14-19, respectively, were re-written as dependent claims 27-35. Claims 36 and 37 are directed to additional preferred embodiments that are disclosed in the specification. Each new claim is supported by the specification of the current application as filed, as well as by the disclosure of the parent PCT application that the present application incorporates by reference. No new matter has been added by way of these new claims, such that their entry at this time is warranted.

Claims 13-15, 17, 20, 22, and 24-25 were rejected under 35 U.S.C. § 102(b) as being anticipated by German Patent Application No. 19650106 to Maiorano et al. ("Maiorano") for the reasons recited on pages 2-3 of the Office Action.

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Applicants respectfully submit that Maiorano is not prior art against the currently pending claims. Maiorano was published on November 27, 1997. The current application claims priority under 35 U.S.C. § 119 to EP Application No. 97202631.4, filed August 28, 1997. An English translation of this document has been filed and acknowledged, and it clearly supports the recitations of the current claims. Thus, Maiorano is antedated by Applicants' priority document, so that Maiorano is not a proper reference for citation against the present claims. For this reason, Applicants respectfully request that the rejection of claims 13-15, 17, 20, 22, and 24-25 by Maiorano under 35 U.S.C. § 102(b) is inapplicable to the present claims.

Claims 13, 15-16, 18, and 21-25 were rejected under 35 U.S.C. § 102(b) as being anticipated by European Patent Application No. 0818149 to Cavalli ("Cavalli") for the reasons recited on pages 4-5 of the Office Action. Claims 19 and 22 were rejected under 35 U.S.C. § 103(a) as being obvious over Cavalli for the reasons recited on pages 5-6 of the Office Action.

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X  
Applicants respectfully submit that Cavalli is also not a proper prior art reference that should be cited against the currently pending claims. Cavalli was published on January 14, 1998. As noted above, the current application claims priority under 35 U.S.C. § 119 to EP Application No. 97202631.4, filed August 28, 1997. Thus, Cavalli is not prior art against the currently pending claims. For this reason, Applicants respectfully request that the rejection of claims 13, 15-16, 18, and 21-25 under 35 U.S.C. § 102(b) and the rejection of claims 19 and 22 under 35 U.S.C. § 103(a) by Cavalli be reconsidered and withdrawn.

Claims 13-15 and 24-25 were rejected under 35 U.S.C. § 102(b) as being anticipated by European Patent Application No. 0666031 to Lauro ("Lauro") for the reasons recited on page 4 of the Office Action.

③  
Moos.  
INV.  
OPAND  
Lauro discloses a cream based on anhydrous food fats and having a water activity of 0.30-0.50 (*See, e.g.*, Abstract). Lauro further includes freeze-dried lactobacilli per gram ranging from  $10^7$  to  $10^{11}$  (*See, e.g.*, page 2, lines 24-25).

New independent claim 26 recites that a texturizing agent is present in the composition. This texturizing agent is at least one of maltodextrin, a fermented cereal product, or combinations thereof. This component gives the composition body while limiting its sweet flavor (*See, e.g.*, Specification, page 5, lines 3-6). As Lauro does not disclose this component, nor the benefit that it imparts to the composition, the claims should not be rejected over Lauro.

③  
OK

Furthermore, new claims 27-29 incorporate features of prior claims that were not rejected over this reference. Claim 27 recites that the cream composition comprises living lactic acid bacteria present at a concentration of  $10^4$  to  $10^{11}$  per gram of mixture, while claim 28 recites that the cream composition has a water activity ( $A_w$ ) of 0.75 to 0.91, and claim 29 recites that the cream composition comprises 10% to 45% of a molten fatty substance. Lauro does not disclose or suggest a cream composition that includes living lactic acid bacteria at a concentration of  $10^4$  to  $10^{11}$  per gram of mixture. Lauro also fails to disclose or suggest a water activity of 0.75 to 0.91. The *highest* water activity disclosed by Lauro is 0.50. Finally, Lauro fails to disclose or suggest a cream composition that includes 10% to 45% of a molten fatty substance. Thus, Lauro fails to disclose or suggest all of the features of the current claims.

④

For all these reasons, Applicants respectfully request that the rejection based on Lauro is also inapplicable to the present claims.

yes

Claims 13, 15-16, 18, and 23 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,800,855 to Rosen ("Rosen") for the reasons recited on page 4 of the Office Action.

Initially, Applicants respectfully submit that Rosen is now § 102(e)-type art, rather than § 102(b)-type art, based on the fact that Rosen was copending with the PCT application to which the present application claims priority.

⑤  
Amendment  
overcome  
1st rept.

Rosen discloses a cream composition that includes about 13% cream cheese, about 24.5% cream, about 19.4% milk, about 10.3% condensed skim milk, about 32.2% liquid cane sugar (21.5% dry cane sugar along with 10.7% water may be substituted), 0.5% of a stabilizing system (which may contain salt), and 0.1% vanilla extract (*See, e.g., Example 1, column 5, lines 40-52*).


As noted above, independent claim 26 recites that a texturizing agent, preferably maltodextrin, a fermented cereal product, or combinations thereof, is present in the composition. Like Lauro, Rosen does not disclose this component, nor the benefit that it imparts to the composition, so that the claims should not be rejected over Rosen. Also, claims 27-29 incorporate features of prior claims that were not rejected over this reference. For these reasons, Applicants respectfully request that the rejection based on Rosen is inapplicable to the present claims.

Accordingly, applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

A Petition for Extension of Time extending the time for responding to and including October 10, 2001, with provision for the required fee, is enclosed. No fee is believed to be due for this response. Should any fees be required, however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,

September 26, 2001  
Date

  
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